

Internal Investigations: Common Conundrums, Conflicting Agendas, and How to Deal With Them

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Conducting an investigation always involves competing agendas and interests, as well as a bevy of common conundrums. Successful compliance professionals develop the ability and judgment to synthesize those matters and accommodating the unique and personal dynamics that each investigation presents.

Although expertise in conducting internal investigations cannot be found in “how to” books or case law, you should consider the practical tips and guidelines contained in the following outline if you direct or participate in internal investigations within your organization. You should also consider the issues of common dynamics and the various perspectives associated with investigations. Al Josephs and Frank Sheeder will present a set of facts and a dialogue that will facilitate discussion and illustrate the practical application of the outlined tips and guidelines.

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A. What is an internal investigation?

- A factual review and legal analysis of potential problems or issues.
- Often conducted by compliance officers, internal audit departments, outside counsel, or all of them.
- Usually independent of a government investigation.

B. When is an internal investigation warranted or necessary?

- Reasonable belief that a problem exists.
- Discovery of potential error through a routine audit or by chance.
- Receipt of actual notice of a potential violation of law or regulation from employees or third parties.
- Learning of a departure from, violation of, or material breach of, the compliance program or company policy.
- Notification from a governmental agency (*i.e.* request for documents, subpoena, or search warrant).
- Learning that the government has begun an investigation.
- Learning that your carrier or fiscal intermediary is conducting an audit.
- Annual OIG Work Plan, OIG Audit Reports, new regulations or revisions to existing regulations identify risk areas.
- Reports received from your Compliance Hotline.
- Patient complaints.

C. Why do an internal investigation?

- Provide you with insight on problematic practices within your organization.
- Determine if there has been any wrongdoing.
- Stop any wrongdoing and implement corrective action immediately.
- Gather information for developing appropriate responses to the government.
- Learn about the strengths and weaknesses of your current control processes.
- Provide your attorney with the information necessary to counsel you about potential legal pitfalls, legal defenses, and options on how to proceed with your case.
- Minimize any potential criminal or civil liabilities.
- Determine whether to make a voluntary disclosure or repayment.

D. What are the advantages of conducting an internal investigation?

- May be able to influence the nature and scope of the government's investigation.
- Gives you better knowledge and influence on an external investigation and the documents that are appropriately produced to the government.
- Allows you to interview witnesses before the government does.
- Allows you to identify potential problem areas before the government does.
- Allows you to stop all potential violations and implement corrective actions.
- Documentation of compliance program activities.

E. What are the disadvantages of conducting an internal investigation?

- Information obtained through an investigation and provided to the government could result in a waiver of certain privileges.
- Waiver may give private litigants access to documents.
- The government may still conduct its own investigation irrespective of your findings.
- Independence of investigation.

F. What should be the scope of the investigation?

- If a formal inquiry has been made, a formal complaint filed, or the government has initiated an investigation, the scope is usually defined (e.g. subpoena, search warrant, request for documents). Your investigation should parallel the issues that the government is investigating.
- If it is a voluntary investigation, the scope depends on the purpose or the nature of the concern (e.g. employee allegations of overbilling; patient complaints of unnecessary medical care).
- Discovery/probe sample.

G. Who should conduct an internal investigation?

- Compliance Officer, if he or she can effectively conduct an objective, independent investigation.
- Outside counsel (working collaboratively with the Compliance Officer) and in some instances in-house counsel because they can more effectively assert the attorney-client privilege and work product immunity protection, and maintain independence and credibility with the government.

- Independent auditors and experts, but only if retained through, and directed by, an attorney so that their communications and work product can remain privileged.
- The Compliance Officer should work with outside legal counsel to determine when it is appropriate to conduct an investigation under attorney client privilege.

H. Attorney vs. non-attorney directed investigations – does it really matter?

- Only attorneys can conduct privileged investigations and assert the attorney-client privilege and the work product immunity protection.
- Experts retained by, and working at or by the attorney's direction, fall under the attorney's privilege umbrella and their reports will be shielded from discovery via the attorney-client privilege and work product immunity protection.
- Attorneys are better suited to analyze legal issues, examine legal consequences, and render legal advice regarding potential defenses, liabilities, and corrective actions.
- Potential for waiver (*i.e.* inadvertent disclosures) is greater when non-attorney is involved in an investigation.
- In all instances the complexity and materiality of the issue should be considered in determining who should conduct the investigation.

I. Compliance Officer vs. outside counsel – what's the difference?

- Compliance Officer.
 - Advantages.
 - Often more knowledgeable about the organization and its business operations and policies.
 - May be more cost efficient to utilize because investigation may proceed more quickly, and because he or she is already on the organization's payroll.
 - Has working knowledge of the compliance program.
 - Disadvantages.
 - Government's potential perception of lack of objectivity and independence.
 - Internal conflicts of interest can arise if a wrongdoer is a high-level official.
- Outside counsel.

- Advantages.
 - Government often views outside counsel as independent of the organization.
 - Can more effectively maintain the attorney-client privilege and work product immunity protection.
 - Provides more objectivity in assessing legal issues and liabilities relating to the investigation.
 - Often has more experience in dealing with government agents in connection with governmental investigations.
 - May be able to avoid formal government action.
 - Usually is exposed to other areas of law and may have a broader knowledge of administrative, criminal, and civil issues relating to fraud.
- Disadvantages.
 - Cost.
 - Scope and complexity of investigation may not warrant outside involvement.
 - Unfamiliarity with the client's organizational structure.

J. What do the attorney-client privilege and the work product immunity protect?

- Attorney-client privilege covers the communications between an attorney and the client. It generally attaches to the complete communication, including legal advice and facts. But pre-existing documents, non-confidential matters of employment, or communications made in furtherance of a crime or fraud are usually not protected.
- Work product immunity covers work relating to the preparation of the client's case. It protects the materials prepared, the mental impressions developed, legal theories and conclusions made by an attorney, and communications made in anticipation of litigation or for trial.

K. How do we preserve privileges?

- Identify who the attorney represents.
- Obtain only legal advice from the attorney because business advice by itself is not privileged.
- Clearly designate all written materials as being privileged.
- Limit the number of persons who have access to privileged information and communications on a "need to know" basis.
- Avoid conflicts of interest.

- Have your counsel carefully review any information or documents to be produced to third parties.

L. Where do we start?

- Empower the Compliance Officer to coordinate the investigation internally.
- Identify any potential obstacles to the investigation.
- Develop and maintain a list of any individuals involved with, or who have knowledge of, the investigation.
- Decide who will be conducting the investigation.
- Take all measures and precautions necessary to preserve privileges.
- Maintain all documents associated with the investigation in separate files clearly marked as Attorney-Client Privilege and Attorney Work Product.
- All communications should be identified as Attorney-Client Privilege and Attorney Work Product, and all electronic communications should be filed in secure (electronic) folders identified as such.
- Develop a strategy for document reviews and witness interviews.
- Designate a document custodian to insure the integrity of documents.
- Make sure affected employees or affected departments know that they are to preserve all documents.
- Gather, organize, and catalog documents according to the government's request for production or according to the issues that you are investigating.
- Document the process used to search for and collect the documents (e.g., who searched, what locations were searched, who had the documents, what documents were retrieved).
- Have your counsel evaluate the documents to issue spot and to prepare for witness interviews.
- Stop any routine (or non-routine) destruction of documents until the investigation is completed.
- Have your counsel do all witness interviews, sometimes in conjunction with an investigator.

M. Do we notify employees about our internal investigation?

- Notify those employees affected by the investigation.
- Advise them that we are investigating potential errors, and that any determinations as to fraud or illegal activities cannot be identified until the investigation is complete.
- If a governmental inquiry or investigation is involved, notify employees that there is a governmental inquiry or investigation, that you are conducting an internal investigation, and that you are cooperating with the government.
- Notify employees that they should cooperate with persons conducting the internal investigation.

- Make sure that witnesses understand that the corporation is the client. Avoid conflicts involving multiple representations of both corporate and individual interests.
- Have counsel notify the employees of their rights, including their right to hire an attorney of their choice.
- Inform employees that it is their decision as to whether they speak with government agents.
- Tell them not to discuss facts with others.
- Tell them to always tell the truth.

N. What witnesses should be interviewed?

- If applicable, interview the complainant.
- If applicable, interview those parties that the complainant identifies as parties with knowledge of relevant facts.
- Interview parties who are named in any allegation.
- Interview those who have indicated that they have relevant information.
- Interview those parties whose names appear in key documents reviewed by your counsel to determine if they may have knowledge of relevant facts.
- Interview third parties who may have information about events or issues that are under investigation.

O. What should employees be told before they are interviewed?

- Who the interviewer represents.
- The purpose of your investigation.
- That the information they provide you is privileged from disclosure outside the corporation.
- They should keep the interview confidential.
- The decision to disclose any information that they provide will be made solely by the corporation.
- The corporation wants them to cooperate fully and completely.
- They may retain their own counsel.
- They have the right to talk or not to talk to government investigators in interview settings.
- They have the right to have their own attorney present during the interview.
- They must be truthful.
- If it is determined that they are personally at risk, they will be advised.
- If they receive a subpoena, they must appear at the time, place, and date indicated in the subpoena.

P. What should we do if we learn that the government is investigating us?

- Have your attorney contact the government agent in charge to determine the basis of the investigation, the specific issues under investigation and, if possible, the government's theory of the case.
- Determine if the government is conducting a civil, criminal, or administrative investigation.
- Communicate to the government that you intend to cooperate with its investigation.

Q. What if an agent shows up at our front door?

- Get your attorney involved immediately.
- Have the agent work with your attorney.
- Keep track of all documents that the government reviews or that it takes, and any persons with whom the agents speak.
- Have your counsel present during interviews or questioning, if possible.
- Follow the organization's policies and procedures related to external investigations.

R. The agent has a search warrant, what should we do?

- Get your attorney involved immediately.
- Be cooperative.
- Ask for a copy of the search warrant. If a copy cannot be provided, ask to read the warrant so that you can respond appropriately to the search.
- Ask the agent for his or her business card or get his or her name and number.
- Keep track of what is done or what is taken, the areas searched, and any persons with whom the agents speak.
- Don't volunteer information.
- Don't attempt to answer substantive questions; let your attorney answer them.
- Don't agree to allow the agents to expand the search beyond what is covered in the warrant.
- Don't attempt to impede the agents' execution of the warrant.
- Ask to make copies of any documents seized before they are removed.
- Ask for an inventory of any property that the agent seizes.

S. What actions can give rise to an obstruction of justice charge?

- Destruction or alteration of documents.
- Certain communications made with or to employees and witnesses (e.g. telling them what to say; suggesting that they not cooperate with government).
- Reporting information to the government that is not factual or not supported by witness interviews or documents.

T. We've investigated, now what?

- Assess whether a written report outlining the investigative results is necessary and if so, what it will cover.
- Assess whether you should make a formal self-disclosure to the government or an informal self-disclosure to your fiscal intermediary or carrier.
- If credible evidence of wrongdoing is uncovered, explore the advantages and disadvantages of self-reporting to the government.
- If there is no credible evidence of wrongdoing, but overpayments are uncovered, consider whether it is necessary to disclose to the government or handle the matter as a routine refund through your fiscal intermediary or carrier.
- Keep in mind that any information provided to the government via a voluntary disclosure could result in a waiver of the attorney-client privilege and work product immunity, and could become discoverable by private third-party litigants.
- Consider re-evaluating your compliance program to ensure its effectiveness and make any necessary and appropriate changes.

U. When is a routine refund not routine?

- You determine that the matter potentially violates federal civil, criminal, or administrative laws.
- You discover credible evidence of fraud.
- The problem is not an isolated incident, but instead, it is systemic within your organization.

V. What are some of the advantages and disadvantages of self-reporting?

- Disclosure demonstrates that you have an effective compliance program that detected an incident of potential non-compliance.
- Disclosure allows you to voluntarily enact measures to detect, reduce, and eliminate future problems.

- Federal Sentencing Guidelines for Organizations provides for leniency for those corporations who self report, have no high level of involvement in the misconduct, and cooperate with the government's prosecution.
- Helps prevent or reduce the number of potential whistleblower actions.
- Corporations who cover-up misconduct expose themselves to harsher criminal penalties and fines.
- Adverse publicity resulting from disclosure.
- Voluntary disclosure alerts the government of potential wrongdoing and may invite punitive action.
- Voluntary disclosure could result in a potential waiver of privileges.
- The government can use your voluntary disclosure against you if it decides to prosecute.

W. How can self-reporting limit whistleblower actions?

- The law precludes a whistleblower's action if there has been a public disclosure of the underlying fraud allegations.
- Self-reporting may constitute a public disclosure.
- The law bars a whistleblower's action if he or she is unable to demonstrate that he or she is the original source of the fraud allegations.

X. We've decided to self-report. What information should our report contain?

- The circumstances that led to the investigation.
- Investigative process and methodology.
- Facts disclosed by your investigation.
- Discussion of applicable laws or regulations.
- The reason for the violation.
- Liability assessment, including arguments for and against the corporation's position.
- Recommended or actual corrective and remedial actions.

Y. What are the collateral consequences of a provider voluntarily disclosing, admitting to, or resolving a fraud case?

- Exposure to civil fines and penalties.
- Loss of professional license.
- Exclusion from Medicare, Medicaid, and other healthcare programs.
- Exposure to third-party lawsuits from patients and insurers.

Z. What factors determine the outcome of a fraud case?

- The nature of the conduct.
- The provider's ability to repay.
- The nature of the provider's practice.
- Whether the provider is a first-time offender.
- The provider's efforts to correct the problem.
- Whether the matter involves successor liability.
- The period over which the conduct took place.
- The effectiveness of the provider's compliance program.
- How the matter was discovered.
- The level of the provider's cooperation.

Issues of Common Dynamics

A. Parties

- Organization.
 - Compliance Officer.
 - Management.
 - Employees.
 - Physicians.
 - Whistleblower.
- Outside Counsel.
- Consultants.
- Government.

B. Commonly Shared Perspectives

- Accountability from, and by, all key players.
- Have high standards for compliance.
- Ensure credibility.
- Preserve the integrity of the process.
- Avoid conflicts of interest.
- Minimize disruption to the entity during the investigative process.
- Identify and resolve issues early, rather than later.
- Develop effective corrective actions plans.
- Maintain privilege.
- Minimize disruption.

C. Management's Perspectives on Internal Investigations

- We are an ethical organization.
- Expensive.
- Bad publicity.
- Risks goodwill with vendors and the healthcare community.
- Risky.
- Financial vulnerability.
- Resource allocation.
- Subsequent civil litigation.
- Creating evidence for adversaries and regulators.

D. OIG's Perspectives on Internal Investigations

- Pattern.
- Intent.
 - Actual knowledge.
 - Conscious indifference.
 - Knew or should have known.
- Entity has not devoted adequate resources to compliance.
- Management does not support compliance.

E. Physicians' Perspectives on Internal Investigations

- Mountain out of a mole hill.
- Everyone does it.
- It will never happen to me.
- Expensive.
- Time consuming.
- Risks reputation.
- May result in peer review.
- Physician-patient privileges.
- Impossible to know all rules and regulations.

F. Compliance Officers' Perspectives on Internal Investigations

- Can help assess the organization's strengths as well as weaknesses.
- Resources required.
- Must be legitimate.
- Management must buy in.

- Can assist governance and management in fulfilling their stewardship and fiduciary responsibilities.
- Can assist management in assessing and improving operational effectiveness and efficiency.

G. Whistleblowers' Perspectives on Internal Investigations

- My concerns fell on deaf ears.
- I followed the compliance protocol, now the provider needs to follow it.
- The provider can't be trusted to do a fair and impartial investigation.
- It was the right thing to report them, now it's their turn to do the right thing.

H. In-House Counsel and Outside Counsel's Perspectives on Internal Investigations

- We should be involved in the process because we can be more objective.
- The provider needs to preserve privilege during this process.
- We know the law and can best evaluate the provider's civil and criminal liability exposure.
- It is better to know about potential problems than not to know.